United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2190

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Civil Action File No. 1973-269

Docket No. 74-2190

UNIVERSAL PRODUCTIONS and
PUBLICATIONS, INC.

Plaintiff-Appellee,

vs.

KENNETH MALONE,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

EASTON, BITTKER, WOLF & DE LUCA
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Rochester, New York, 14604
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PRELIMINARY STATEMENT PURSUANT TO SECTION 28 OF RULES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

This is an appeal from an unreported Judgment of Hon. Harold P. Burke, District Court Judge, District Court of the United States for the Western District of New York, dated July 29, 1974, and filed July 30, 1974, and from the underlying Decision, Findings of Fact and Conclusions of Law filed on June 7, 1974.

TABLE OF CASES

TABLE OF STATUTES

STATEMENT OF ISSUES FOR REVIEW

1. Do the Federal Courts have jurisdiction pursuant to 28 U.S.C. §1332 in an equity action where the record below is barren of evidence of the value of injury to the right sought to be protected, or of the value of the right itself which is sought to be protected?

2. Does the substantive law of New York State permit the enforcement of a covenant by an employee not to compete with his employer, absence proof of the uniqueness of the employee's services, the dissemination of trade secrets or other confidential information, or the pirating of the former employee's customers?

3. Do words and phrases acquire a secondary meaning when, although well established elsewhere, they are introduced into a new market area where similar words and phrases have been used throughout the industry?

STATEMENT OF THE CASE

This is an action brought by Universal Productions and Publications, Inc., a Louisiana corporation, pursuant to 28 U.S.C. §§ 1332 and 1338 and 15 U.S.C. §1121, against Kenneth Malone, a New York resident and former employee seeking (1) specifically to enforce a covenant not to compete contained in contracts between Universal and Malone; (2) an order restraining Malone from alleged unfair competition; (3) an order permanently enjoining Malone from alleged trademark and servicemark infringement; and (4) monetary damages.

The summons and complaint were personally served upon Malone on June 4, 1973. Pretrial discovery consisted only of interrogatories and answers. Preliminary injunctive relief was not granted. Trial was had in the United States District Court for the Western District of New York, Hon. Harold P. Burke, District Court Judge presiding on January 15, 16 and 17, 1974. The District Court's Decision, Findings of Fact and Conclusions of Law were filed June 7, 1974, and Judgment thereon filed on July 30, 1974.

The District Court found that Federal court jurisdiction existed under 28 U.S.C. §1332, modified the covenant not to compete as to duration and, as so modified, decreed specific performance thereof, and permanently enjoined the use by Malone of the words "Miss Petite", "Little Miss" or any other name confusingly similar thereto.

Malone appealed from the Judgment, Decision, Findings of Fact

and Conclusions of Law, by Notice of Appeal filed August 23, 1974. Permission to proceed on appeal in forma pauperis was granted by order of Hon. Harold P. Burke, District Court Judge, filed September 25, 1974.

Plaintiff Universal established a beauty pageant system for young children in 1962 known as World Our Little Miss Pageant. Transcript, pages 42-47. Operating primarily in the southern United States, the pageant system comprised three distinct pageants: Miss LaPetite for children ages 3 through 6, Our Little Miss for children ages 7 through 12, and Ideal Miss for children ages 13 through 17. Each age group pageant proceeded through three levels of competition: local, state and world.

Universal, from headquarters in Baton Rouge, Louisiana, hired "state directors" throughout its area of operation, each of whom was charged with drumming up participants for local pageants, and shepherding them through the intermediate level of competition to the world pageant. Universal set quotas for numbers of participants, sold pageant paraphernalia to the "state directors" and charged each "state director" a fee based upon his quota of pageant participants. The agreement between Universal and "state directors" was contained in a form contract prepared by Universal. Answers to Interrogatories Propounded by Defendant, Ans. No. 9d; Plaintiff's Exhibits Nos. 1-11.

Defendant Malone, a high school graduate, first became associated with Universal in 1970. Transcript, page 54. Having commenced his professional training at the age of five years, Malone had accumulated

substantial experience in the theatrical world, in dance and dance-teaching, show business, television performances and, in 1969-1970, as originator and entrepreneur of Dance Pageant of America, a dance competition in southernNew York. Transcript, page 245-249.

In 1971 Malone was hired by Universal as "state director" of World Our Little Miss Pageant in eleven northeastern states: New York, Connecticut, Ohio, Massachusetts, New Jersey, Maine, New Hampshire, Pennsylvania, Rhode Island, Delaware and Vermont. Form contracts were executed. Plaintiff's Exhibits Nos. 1-11. Implementation of the decision, made by Universal in 1968, to undertake a "big push into the Northeast" (Transcript, page 56), was not successful. Malone, unable to meet his quota of fees from actual enrollment in local pageants, lost money and instituted a system of drumming up participants at the state level by audition, rather than by staging local pageants. Transcript, pages 266, 59-60. A contract for the 1972 pageant year, which normally would have been offered in September of 1972 (Transcript, page 62), was not extended to Malone. Transcript, page 95.

In 1972, after the termination of the relationship with Universal, Malone established a talent and beauty pageant system for young children known as International Pageant System. Transcript, page 114. Commencing operation in several northeastern states, the International Pageant System comprised three distinct pageants: Miss Petite for children ages 5 through 8; Little Miss for children ages 9 through 12; and Miss Teen for children ages 13 through 17. Plaintiff's Exhibit No. 31. Judging was based upon

substantially different criteria from Universal's pageants. Affidavit in Opposition to motion for Preliminary Injunction, Exhibit 3.

Universal, by letter dated April 25, 1973, advised past participants in Universal's World Our Little Miss Pageant of possible confusion between names used by Malone and names used by Universal. Defendant's Exhibit No. 27. Malone, by letter dated May 7, 1973, offered cash refunds to all participants in International Pageant System claiming enrollment by mistake in identity. Defendant's Exhibit No. 28.

Suit was commenced on June 4, 1973.

POINT I.

UNIVERSAL HAS FAILED TO PROVE FEDERAL COURT JURISDICTION UNDER 28 U.S.C. § 1332

Plaintiff Universal, seeking to invoke Federal Court diversity jurisdiction must prove that the matter in controversy exceeds

> "the sum or value of $10,000, exclusive of interest and costs . . ."
> 28 U.S.C. § 1332 (a)

Upon challenge of jurisdictional facts, Universal must support them by competent proof. Seagram Distillers Corp. v New Cut Rate Liquors, 245 F 2d. 453 (No. 7 cir. 1957), citing McNutt v General Motors Acceptance Corp., 298 U.S. 178, 56 S. Ct 780, 80 L. Ed. 1135. Universal has not sustained this burden.

Where plaintiff seeks to enjoin acts which have, or will in the future, injure a property right, plaintiff must adduce proof that the acts complained of, if not restrained, will cause injury in excess of $10,000. In such a case, the test of jurisdictional amount is not the value of the property right sought to be protected, but the value of past and future injury to that right. Seagram Distillers Corp. v New Cut Rate Liquors, 245 F 2d. 453 (No. 7 cir. 1957).

The District Court found that the jurisdictional amount had been met, measured by either test (Findings of Fact, Finding No. 3), a finding it is submitted, that is supported nowhere in the record.

Universal waived its claim for monetary damages (Complaint, Request for Relief No. 4) in open court. Transcript, page 109. None were proved. Although testimony does reflect the expenditure of money

by Universal to establish good will (Transcript, Pages 48-49), no direct proof of the value of Universal's good will was adduced.

With respect to such a record, the Court of Appeals for the Seventh Circuit has said:

> "Defendant's acts did not prevent plaintiff from using its good will in the conduct of its business. The damage to plaintiff's good will lost or threatened by defendant's acts is the subject of this case." Seagram Distillers Corp. v New Cut Rate Liquors, 245 F 2d. 453, at page 458.

It is respectfully submitted that Universal has failed to prove Federal Court jurisdiction under 28 U. S. C. § 1332 (a), that the District Court erred in applying an inappropriate test of jurisdictional amount, and made a finding not supported by the record.

POINT II.

THE EXPRESS NEGATIVE COVENANT NOT TO COMPETE IS VOID AS AGAINST NEW YORK PUBLIC POLICY

An express negative covenant by an employee not to compete with his employer in the future, in the absence of proof of the unique character of the employee's services, betrayal of confidential information, or trade secrets, or the pirating of customers, is void as against the public policy of the State of New York. Paramount Pad Co. v. Baumrind, 4 N.Y. 2d 393; Clark Paper & Mfg. Co. v. Stenacher, 236 N.Y. 312; Kaumograph v. Stampograph Co., 235 N.Y. 1; New York General Business Law, Section 340.

The relationship between Universal and Malone was that of employer and employee. Although at one point in the testimony, Universal's president, Mr. Carl Dunn, likened the relationship to that of franchisor and franchisee (Transcript, pg. 55) the contracts in evidence (Plaintiff's exhibits Nos. 1-11) clearly establish that, for all practical purposes, Malone was Universal's employee.

> "Said contract shall be binding and non-expiring so long as the state director... agrees to stage each year under that current year's staging plan, percentage plan, and the rules and regulations as stipulated in the State Director's Plan and the Staging Handbook and supplements for that year; and so long as the state pageant for the above mentioned state follows a normal growth pattern as established in other states ...." Plaintiff's exhibits Nos. 1-11.

To show that Malone was Universal's employee, is not to sustain the burden of proof required, for equity will not act to deprive a man of his livelihood merely because it places him in competition with his former employer. Clark Paper & Mfg. Co. v. Stenacher, 236 N.Y. 1. The record does not bring this case within the principle that an injunction may issue "to enforce ... [a covenant not to compete] when the employee has become the possessor of valuable trade secrets concerning his employer's business." Clark Paper & Mfg. Co. v. Stenacher, 236 N.Y. 312, at pg. 320. Undisputed testimony shows that Malone was experienced in the field of children's pageantry prior to joining Universal in 1970, having groomed participants for many years and producing his own Dance Pageant of America in 1969 and 1970. Transcript, pages 120, 245-249.

Neither will the record support a finding that Malone's services were "special, unique or extraordinary". Purchasing Associates v. Weitz, 13 N.Y. 2d 267. On the contrary, testimony and correspondence in evidence, support the proposition that Universal terminated the relationship with Malone for the reason that his services were of little value. Transcript, pages 118, 265-266; Defendant's exhibit No. 4.

> " ' I will dump the entire pageant system on the east coast and bring in contestants-at-large for several years ... (sic) rather than jeopardize the entire pageant system. We cannot and will not (emphasis in original) allow you to stage under the plan you used last year and are proposing to use again this year."
> Defendant's Exhibit No. 4.

Nor does the proof establish that Malone had engaged in the "solicitation of, or disclosure of any information concerning .... [Universal's] customers". Purchasing Associates v. Weitz, 13 N.Y. 2d 267, at 272, citing Carpenter & Hughes v. De Joseph, 10 N.Y. 2d 925 and Clark Paper & Mfg. Co. v. Stenacher, 236 N.Y. 312. The proof does establish, however, that Malone had created mailing lists in connection with the Dance Pageant of America prior to association with Universal, and that customer information could be obtained by any person simply by attending a Universal pageant.

The negative covenant contained in Universal's form contract with Malone servesno purpose other than to shield Universal from the lawful competition of a former employer, is repugnant to the public policy of the State of New York, and should not be enforced by a court of equity.

POINT III .

"LITTLE MISS" and "MISS LaPETITE" HAVE NO SECONDARY MEANING IN THE GEOGRAPHICAL AREA IN WHICH PROTECTION IS SOUGHT

The gravamen of Universal's request that Malone be enjoined from using the phrases "Little Miss" and "Miss LaPetite" lies in the injury or damage to Universal from Malone's use thereof. N.Y. Jurisprudence, Volume 60, Section 9. Having failed at trial to sustain its claim to trade mark or service mark protection, Universal must sustain the finding below (Findings of Fact, Finding No. 15), that the words alleged had acquired a secondary meaning.

With respect to the difference between the degree of protection afforded a trade mark and that afforded a trade name, the New York Court of Appeals has said:

> "It may be conceded that there may be a difference in the extent of the territory to which the remedy can or should be applied. There are many trade names which are so essentially associated with or applicable to a particular locality that their use in other places cannot deceive or mislead, and for that reason they may not be interdicted. But there are other instances in which a trade name and its infringement may be co-extensive with the trade, and when that is so, there seems to be no valid reason why the remedy should be less far-reaching than the wrong." Ball v Broadway Bazaar, 194 N.Y. 429, at pages 435-436.

Where a secondary meaning has attached, the words may not be used in competition in the same geographical area. Mtr. of Playland Holding Corp. v Playland Center Inc., 1 N.Y. 2d 300.

The record is replete with reference to the use of the words "Little Miss" and "Miss . . ." : Miss Charm, (Transcript, pg. 152), Little Miss America, (Transcript, pg. 81), Miss Universe, (Transcript, pg. 180), Little Miss Hemisphere, (Transcript, pg. 260), Little Miss Charm, (Transcript, pg. 83), Miss LaPetite, (Transcript, pg. 156), by persons other than Universal. The word "Petite" is in common usage throughout the garment industry to denote a size range. (Transcript, pg. 158).

Although Universal had spent sums of money throughout the country to place its names before the public, the thrust of testimony presented supports the proposition that its efforts, until 1968, had been centered largely in the southern portion of the United States. It is submitted that the words alleged had not acquired a secondary meaning within the northeastern portion of the United States by reason of the short period of time Universal had sought to establish its names in that area, and by the common usage within the pageant industry of the terms alleged. Association of Contracting Plumbers v Contracting Plumbers Association, 302 N.Y. 495; Wholesale Service Supply Corporation v Wholesale Building Materials Corp., 304 N.Y. 855.

CONCLUSION

It is respectfully submitted that the Judgment of the Court below should be reversed and the Injunction issued thereby vacated.

Respectfully submitted,

EASTON, BITTKER, WOLF and DE LUCA
Attorneys for Defendant - Appellant
Office and Post Office Address:
875 Midtown Tower
Rochester, New York 14604
Telephone: area code (716)-325-4717

STATUTES INVOLVED

28 U.S.C. §1332 (a)

"§1332. Diversity of citizenship; amount in controversy; costs

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between --

"(1) citizens of different States;

"(2) citizens of a State, and foreign states or citizens or subjects thereof; and

"(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties."

New York State General Business Law, §340

"§340. Contracts or agreements for monopoly or in restraint of trade illegal and void

"1. Every contract, agreement, arrangement or combination whereby

"A monopoly in the conduct of any business, trade or commerce or in the furnishing of any service in this state, is or may be established or maintained, or whereby

"Competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained or whereby

"For the purpose of establishing or maintaining any such monopoly or unlawfully interfering with the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state any business, trade or commerce or the furnishing of any service is or may be restrained, is hereby declared to be against public policy, illegal and void.

"2. Subject to the exceptions hereinafter provided in this section, the provisions of this article shall apply to licensed insurers, licensed insurance agents, licensed insurance brokers, licensed independent adjusters and other persons and organizations subject to the provisions of the insurance law, to the extent not regulated by provisions of article eight of the insurance law; and further provided, that nothing in this section shall apply to the marine insurances, including marine protection and indemnity insurance and marine reinsurance, exempted from the operation of article eight of the insurance law.

"3. The provisions of this article shall not apply to cooperative associations, corporate or otherwise, of farmers, gardeners, or dairymen, including live stock farmers and fruit growers, nor to contracts, agreements or arrangements made by such associations, nor to bona fide labor unions.

"4. The labor of human beings shall not be deemed or held to be a commodity or article of commerce as such terms are used in this section and nothing herein contained shall be deemed to prohibit or restrict the right of workingmen to combine in unions, organizations and associations, not organized for the purpose of profit.

"5. An action to recover damages caused by a violation of this section must be commenced within four years after the cause of action has accrued. This limitation shall not apply to any suit which has been commenced within one year after the effective date of this act. At or before the commencement of any civil action by a party other than the attorney-general for a violation of this section, notice thereof shall be served upon the attorney-general."

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNIVERSAL PRODUCTIONS and
PUBLICATIONS, INC.,

Plaintiff

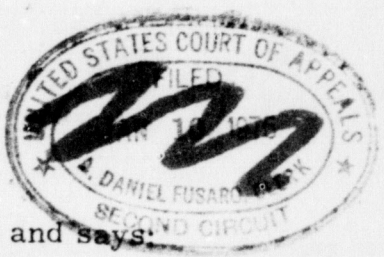
-vs-

KENNETH MALONE,

Defendant

PROOF OF SERVICE
OF BRIEF

Docket No. 74-2190



STATE OF NEW YORK)
COUNTY OF MONROE) SS:

GEORGE T. WOLF, being duly sworn, deposes and says:

(1) Deponent is not a party to this action, is over eighteen (18) years of age and resides at 28 Potter Place, Fairport, New York.

(2) That on December 19, 1974, deponent served the Brief for Appellant upon the United States Court of Appeals, Second Circuit at the United States Courthouse, Foley Square, New York, New York, 10007, the address designated by said Court for that purpose by leaving a true copy of same enclosed in a properly addressed and sealed manila envelope with Emery Air Freight Corporation at the Rochester Monroe County Airport for delivery by VIP Service.

(3) That on December 20, 1974, deponent served the Brief for Appellant upon James F. Young, Esq. of Sayles, Evans, Brayton, Palmer and Tifft, atttorneys for Plaintiff in this action at 415 East Water Street, P.O. Box 87, Elmira, New York, the address designated by said attorneys for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

GEORGE T. WOLF

Sworn to before me this

9th day of January, 1975.

Carol A Agusta

NOTARY PUBLIC

CAROL A. AGUSTA
NOTARY PUBLIC, State of N.Y. Monroe County
My Commission Expires March 30, 1976

December 20, 1974

James F. Young, Esq.
Sayles, Evans, Brayton,
Palmer & Tifft, Esqs.
415 East Water Street - P.O. Box 87
Elmira, New York 14902

Re: Universal Productions & Publications, Inc.
vs. Kenneth Malone

Dear Mr. Young:

We enclose herewith one copy Appellant's Brief pursuant to Rule 31 (b) of the Federal Rules of Appellate Procedure. Permission to proceed in forma pauperis was granted by Order of Hon. Harold P. Burke, District Court Judge, filed September 25, 1974.

Please acknowledge receipt by stamping the enclosed tissue copy of this letter and returning in the stamped addressed envelope.

Thank you very much.

Very truly yours,

EASTON, BITTKER, WOLF & DE LUCA

George T. Wolf

GTW/cat
Enclosure

RECEIPT FOR CERTIFIED MAIL—30¢ (plus postage)

POSTMARK OR DATE 12/20/74

James F. Young, Esq.
Sayles, Evans, Brayton,
STREET AND NO. Palmer & Tifft, Esqs.
415 East Water St., PO Box 87
P.O., STATE AND ZIP CODE
Elmira, New York 14902

OPTIONAL SERVICES FOR ADDITIONAL FEES

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With delivery to addressee only — 65¢
2. Shows to whom, date and where delivered — 35¢
With delivery to addressee only — 85¢

DELIVER TO ADDRESSEE ONLY — 50¢

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No. 627484

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627484

INSURED NO.

DATE DELIVERED

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(1) [signature]

SIGNATURE OF ADDRESSEE'S AGENT, IF ANY
(2) [signature]

SHOW WHERE DELIVERED (Only if requested, and include ZIP Code)
(3) M O. Windsor

STATE OF NEW YORK, COUNTY OF

CERTIFICATION BY ATTORNEY

The undersigned, an attorney admitted to practice in the courts of New York State, certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

Dated:

.....

STATE OF NEW YORK, COUNTY OF

ATTORNEY'S AFFIRMATION

The undersigned, an attorney admitted to practice in the courts of New York State, shows: that deponent is the attorney(s) of record for in the within action; that deponent has read the foregoing and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

.....

STATE OF NEW YORK, COUNTY OF

ss.:

INDIVIDUAL VERIFICATION

, being duly sworn, deposes and says that deponent is the in the within action; that deponent has read the foregoing and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

Sworn to before me, this day of 19

.....

STATE OF NEW YORK, COUNTY OF ss.: **CORPORATE VERIFICATION**

, being duly sworn, deposes and says that deponent is the of the corporation named in the within action; that deponent has read the foregoing and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true.

This verification is made by deponent because is a corporation. Deponent is an officer thereof, to-wit, its

The grounds of depon 's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me, this day of 19

.....

STATE OF NEW YORK, COUNTY OF ss.: **AFFIDAVIT OF SERVICE BY MAIL**

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 deponent served the within upon attorney(s) for in this action, at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me, this day of 19

.....

STATE OF NEW YORK, COUNTY OF ss.: **AFFIDAVIT OF PERSONAL SERVICE**

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 at No. deponent served the within upon the herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me, this day of 19

.....

NOTICE OF ENTRY

Sir:- Please take notice that the within is a *(certified)* true copy of a

duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

EASTON, BITTKER & WOLF

Attorneys for

Office and Post Office Address

875 Midtown Tower

ROCHESTER, NEW YORK 14604

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

EASTON, BITTKER & WOLF

Attorneys for

Office and Post Office Address

875 Midtown Tower

ROCHESTER, NEW YORK 14604

To

Attorney(s) for

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNIVERSAL PRODUCTIONS and PUBLICATIONS, INC.,

Plaintiff,

-VS-

KENNETH MALONE,

Defendant

ORIGINAL

PROOF OF SERVICE OF BRIEF

EASTON, BITTKER, WOLF and DE LUCA

Attorneys for Defendant

Office and Post Office Address, Telephone

875 Midtown Tower

ROCHESTER, NEW YORK 14604

(716) 325-4717

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

.....

Attorney(s) for